

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 17, 2011

v

KYLE CHRISTOPHER-JACK NUYEN,

Defendant-Appellant.

No. 299089
Calhoun Circuit Court
LC No. 09-001908-FH

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

A jury convicted defendant of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to two days in jail for the felonious assault conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant's convictions arise from an altercation between defendant and Cecil Moore, an employee of Rent First. Moore went to defendant's home to repossess a washer and dryer owned by Rent First because defendant's rental payment was past due and defendant had failed to respond to any of Moore's telephone messages and door tags previously left at defendant's residence. Moore knocked on defendant's door and heard a child say, "There's someone at the door." After a few minutes, Moore again knocked on the door and again heard a child say that there was a person at the door. Approximately 15 minutes later, Moore noticed movement inside the home. Moore watched as defendant picked up a gun, placed a clip inside it, and slid the chamber forward. Defendant opened the door, pointed the gun at Moore, and told Moore, "If you ever knock on my door again, I'm gonna put two in your face." Moore left defendant's home and filed a police report. Defendant testified that he believed someone was breaking into his home when Moore was knocking on his door and that he acted in self-defense.

On appeal, defendant first claims that there was insufficient evidence to support his convictions. We review challenges to the sufficiency of the evidence de novo. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). The evidence is viewed in a light most favorable to the prosecution to determine whether a rational jury could find that each element of the crime was proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). The elements that must be established beyond a reasonable doubt to sustain a conviction for felonious assault are: "(1) an assault, (2) with a dangerous

weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Chambers*, 277 Mich App 1, 8; 742 NW2d 610 (2007) (quotation and citation omitted). “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

When the evidence presented at trial is taken as a whole and viewed in a light most favorable to the prosecution, *Nowack*, 462 Mich at 399-400, the evidence is sufficient to support defendant’s convictions. Moore testified that after he knocked on the door of defendant’s home for a while defendant opened the door, pointed a gun at him, and told him “if you ever knock on my door again, I’m gonna put two in your face.” This testimony alone was sufficient to support a finding that the elements of felonious assault were established beyond a reasonable doubt. The evidence was also sufficient to support a finding that the elements of felony-firearm were established beyond a reasonable doubt. Moore testified that defendant pointed a firearm at him, and the firearm was used during the commission of the felonious assault.

Defendant also argues that the prosecution failed to present sufficient evidence to disprove his claim of self defense. The use of force against another person in self-defense is justifiable if “the defendant honestly and reasonably believes that his life is in imminent danger or that there is a threat of serious bodily harm.” *People v Roper*, 286 Mich App 77, 86; 777 NW2d 483 (2009) (citation and quotation omitted); MCL 780.972. “Once evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt.” *Roper*, 286 Mich App at 86 (citation and quotation omitted). Here, the prosecution presented sufficient evidence to rebut defendant’s claim of self-defense beyond a reasonable doubt. Defendant claimed that he did not know who was outside his door and that he believed the person was trying to break into his home; however, a police officer who went to defendant’s house after the report was filed testified that defendant admitted that he knew the person at the door was there to repossess his appliances. Defendant also testified that his daughter ran upstairs screaming that someone was breaking down the door, but Moore testified that he heard a child say that someone was at the door, not that someone was trying to break down the door. It is up to the finder of fact to make decisions about credibility of witnesses and the probative value of evidence. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992). When the evidence is viewed in the light most favorable to the prosecution, there was sufficient evidence to find beyond a reasonable doubt that defendant did have an honest and reasonable belief that his life was in imminent danger or that there was a threat of serious bodily harm.

Defendant also claims that his convictions were against the great weight of the evidence. A verdict is contrary to the great weight of the evidence if “the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Where contradictory evidence is provided at trial, the jury’s determinations should be given deference “unless it can be said that [the] directly contradictory testimony was so far impeached that ‘it was deprived of all probative value or that the jury could not believe it,’ or contradicted indisputable physical facts or defied physical realities.” *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998) (quotation omitted). The evidence of record does not “preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand,” *Musser*, 259 Mich App at 218-219, and there has been no showing that defendant’s contradictory testimony

rendered the prosecution's evidence unbelievable or deprived it of all probative value, *Lemmon*, 456 Mich at 445-446. Therefore, we find that the verdict was not against the great weight of the evidence.

Next, defendant argues that the trial court's instruction to the jury regarding self-defense deprived him of a fair trial. Specifically, defendant argues that the trial court erred when it included reference to the general duty to retreat in its instruction. Because defendant did not object to the instruction at trial, this issue is unpreserved and we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). The defendant must show that an error occurred, that the error was plain, and that the plain error affected substantial rights. *Id.* Substantial rights are affected when the error affected the outcome of the trial. *Id.* at 763.

The trial court instructed the jury that defendant "claims that he was acting in lawful self-defense," and explained that the jury must find that defendant was not engaged in the commission of a crime, and that defendant "honestly and reasonably believed that he had to use force to protect himself or others from the imminent unlawful use of force by another." Specifically, in regard to the duty to retreat, the trial court instructed the jury:

A person can use deadly force in self defense only where it is necessary to do so. If the Defendant could have safely retreated but did not do so, you may consider that in deciding whether he honestly and reasonably believed he needed to use that force in self defense. However a person is never required to retreat if attacked in his own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to sudden, fierce and violent attack.

The trial court's instruction does not constitute plain error affecting substantial rights in light of the trial court's specific instruction that a person is never required to retreat if attacked in his own home. This case is similar to *People v Richardson*, __ Mich __; __ NW2d __ (Docket No. 141752, issued July 29, 2011), slip op at 2, where the Court considered essentially the same instruction given in this case. The Court found that the instruction given by the trial court was "appropriate" because "there was adequate evidence from which the jury could conclude that [the defendant] did not need to use deadly force to defend himself," and because the jury was instructed that there is never a duty to retreat when attacked in one's home despite the fact that it was also instructed about the duty to retreat. *Id.*, slip op at 4-5.

Defendant also argues that he was denied a fair trial as a result of prosecutorial misconduct. Specifically, defendant argues that the prosecutor "tampered" with the testimony of an officer by telling the officer how she should testify on rebuttal. Because the alleged misconduct was not objected to during trial, we review defendant's claim of error for plain error affecting substantial rights. *Carines*, 460 Mich at 752-753, 764. Defendant has not demonstrated plain error affecting his substantial rights. The officer's testimony in the prosecutor's case-in-chief and in rebuttal after the alleged misconduct was essentially the same. The officer testified on direct examination that she knocked on both the outside and inside back door, and on rebuttal the officer repeated the same testimony. Even assuming that it was error for the prosecutor to talk to the officer before she testified on rebuttal, defendant has not demonstrated that the

outcome of the proceedings was affected by the prosecutor's conversation with the officer before the rebuttal testimony was presented to the jury.

Next, defendant argues that he was denied a fair trial because the trial court "nonverbally" communicated its bias in favor of the prosecution during defendant's testimony. Specifically, defendant claims that the trial court judge was rolling his eyes during defendant's testimony and that the jury was watching the judge.

"The principal limitation on a court's discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality." *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). The test to determine whether the trial court's comments or conduct pierced the veil of impartiality is whether the conduct "may well have unjustifiably aroused suspicion in the mind of the jury as to a witness' credibility, and whether partiality quite possibly could have influenced the jury to the detriment of defendant's case." *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992). Defendant has not demonstrated plain error affecting substantial rights in regard to his unpreserved issue of alleged judicial bias. Even if we assume that the trial judge improperly rolled his eyes during defendant's testimony, defendant cannot establish that the error affected his substantial rights. The jury foreperson testified at an evidentiary hearing on the motion for new trial that he did not observe the trial court judge roll his eyes or take any other action that nonverbally communicated any bias. The foreperson also testified that no other member of the jury discussed the trial court judge's actions. The record does not support that the trial court displayed partiality that "quite possibly could have influenced the jury to the detriment of defendant's case." *Id.* at 405.

Lastly, defendant argues that defense counsel was ineffective for several reasons. In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 311-312; 521 NW2d 797 (1994). To demonstrate prejudice, defendant must show a "reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant first contends that defense counsel was ineffective because he failed to demand a preliminary examination where he could have moved the trial court to quash the information and dismiss the charges against defendant. The record does not support defendant's assertion that that defense counsel could have successfully moved to quash or have the charged dismissed if a preliminary examination had been conducted. The evidence admitted during trial regarding each charged offense fully supported the verdicts. Defendant cannot establish that counsel's performance fell below an objective standard of reasonableness or that he was prejudiced.

Second, defendant argues that defense counsel was ineffective because he did not make an opening statement. However, a defense counsel's decision to waive opening statement is generally a matter of reasonable trial strategy. See *People v Calhoun*, 178 Mich App 57, 524; 444 NW2d 232 (1989) (finding defense counsel's failure to make an opening statement was part of a valid trial strategy).

Third, defendant argues that defense counsel was ineffective because he failed to move for a mistrial after learning of the prosecutor's misconduct, specifically the alleged witness tampering. However, as discussed *supra*, even if the prosecution committed the alleged misconduct, there is no reason to believe the conduct of the prosecutor prejudiced defendant. Specifically, defendant cannot demonstrate that but for counsel's failure to move for a mistrial, the outcome of the proceedings would have been different. The testimony of the witness remained essentially the same before and after the alleged tampering occurred.

Lastly, we note that in his statement of the issue presented defendant argues that defense counsel was ineffective for failing to move for a directed verdict after the close of the prosecutor's case; however, defendant does not address this argument in his analysis. Further, the issue has no basis on the record before us. Defense counsel did in fact move for a directed verdict. While counsel did not move the directed verdict until after presenting defendant's testimony, the trial court stated that it would nevertheless consider the motion as if it had been made at the close of the prosecution's proofs.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey